INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 64

UNITED STATES OF AMERICA

v.

DAVID THOMAS HEALY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the district court dismissing the indictment (R. 7-8) is not reported.

JURISDICTION

The judgment of the district court dismissing the indictment was filed on September 19, 1962 (R. 2, 7-8). A petition for rehearing was filed on October 17, 1962, and denied on November 8, 1962 (R. 2, 9-12). Notice of appeal was filed on December 5,

1962 (R. 2, 13-14) and on April 15, 1963, probable jurisdiction was noted (R. 15; 372 U.S. 963). The jurisdiction of this Court rests upon 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether the words "or otherwise" as used in the phrase "held for ransom or reward or otherwise" in the Federal Kidnaping Act (18 U.S.C. 1201) are limited in their application to the holding of a kidnaped person for some pecuniary benefit to the defendants.

2. Whether the statute punishing aircraft piracy (49 U.S.C. 1472(i)), which by its terms covers any "aircraft in flight in air commerce," applies only to commercial airliners engaged in the carriage of goods and persons for hire.

STATUTES INVOLVED

18 U.S.C. 3731 provides in part as follows:

Appeal by United States.

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * *

18 U.S.C. 1201 provides in part as follows:

(a) Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

* * * * *

Public Law 87-197, enacted on September 5, 1961, 75 Stat. 466, amended Section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) in part by adding:

AIRCRAFT PIRACY

(i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—

(A) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or

(B) by imprisonment for not less than twenty years, if the death penalty is not imposed.

(2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

Section 101 of the Federal Aviation Act of 1958, 72 Stat. 737 (49 U.S.C. 1301) provides in part as follows:

> Section 101. As used in this Act, unless the context otherwise requires—
>
> * * * *
>
> (4) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation or [*sic*] aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.
>
> (5) "Aircraft" means any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.
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> * * * *

STATEMENT

Count 1 (R. 3) of an indictment returned in the United States District Court for the Southern District of Florida charged that on April 13, 1962, in violation of 18 U.S.C. 1201 (*supra*, p. 3), the defendants kidnaped, at gunpoint, one Mead, the pilot of a Cessna 172 aircraft, and forced him, against his will, to fly the plane from Dade County, Florida, to the Republic of Cuba for the purpose of transporting the defendants to Cuba. Count 2 (R. 4) charged that on the same date the defendants, while passengers in the Cessna, committed aircraft piracy in violation of 49 U.S.C. 1472(i) (*supra*, p. 3) by unlawfully, at gunpoint, forcing the pilot to fly

from Dade County, Florida, to the Republic of Cuba while operating within the limits of a federal airway so as directly to affect safety in interstate, overseas and foreign air commerce.

The district court ordered both counts of the indictment dismissed (R. 2, 7-8). It held that Count 1 failed to state an offense under 18 U.S.C. 1201 in that it did not allege that the person kidnaped was held "for ransom or reward or otherwise," because that phrase is confined to purposes which, like ransom or reward, involve some pecuniary profit to the defendants (R. 7). The court dismissed Count 2 on the ground that the aircraft alleged to have been pirated was not "an aircraft in flight in air commerce" within the meaning of 49 U.S.C. 1472(i), ruling that this statutory language is "applicable only to commercial airliners engaged in the carriage of goods and persons for hire" (R. 7-8).

SUMMARY OF ARGUMENT

I

Count 1, charging that the aircraft pilot had been kidnaped for the purpose of transporting the defendants from Florida to Cuba, stated an offense under 18 U.S.C. 1201 even though there was no claim that the victim was held for pecuniary profit. The district court's ruling that the victim was not held for "ransom or reward or otherwise" in that the defendants were not seeking financial profit is directly contrary to the Court's decision in *Gooch* v. *United States*, 297 U.S. 124, holding that the transporta-

tion of police officers seized and held to prevent the arrest of their captors is a violation of the Federal Kidnaping Act (formerly 18 U.S.C. (1940 ed.) 408a, now 18 U.S.C. 1201).

In *Gooch* the Court rejected the very same argument accepted by the district court here, *i.e.*, that under the rule of *ejusdem generis* the statutory words "ransom or reward or otherwise" are limited to some pecuniary benefit or the payment of a valuable consideration. The legislative history makes it quite clear that the purpose of Congress in adding to the statute the words "or otherwise" was—as this Court stated in *Gooch*—to extend the Act's coverage to "persons who have been kidnaped and held, not only for reward, but for any other reason * * *" (297 U.S. at 127-128).

The lower federal courts have consistently followed *Gooch* in holding that the Act is violated if the restraint of the party kidnaped is of some benefit to the captor, without regard to whether that benefit is pecuniary to him.

II

Section 902 of the Federal Aviation Act, as amended in 1961, defines the crime of "air piracy" as "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce." The definition of "air commerce," contained in Section 101(4), embraces not only "interstate, overseas, or foreign air commerce" as such, but also "any operation or navigation or [*sic*] aircraft with-

in the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."

Count 2 of the indictment plainly charged all the elements of an aircraft piracy within the meaning of these sections. In dismissing count 2 on the ground that the phrase "aircraft in flight in air commerce" applies only to commercial airliners engaged in the carriage of persons and goods for hire, the district court read into the Act a limitation which has no basis either in the text or legislative history of the statute. When Congress wished to frame a provision applicable only to air carriers, it knew how to do so; for subsection (l) of Section 902, adopted at the same time as the air piracy subsection, outlaws the carrying of deadly or dangerous weapons on "an air carrier in air transportation." If there remained any doubt as to the scope of Section 902(i), it would be laid to rest by the legislative history of the 1961 amendment. The House Report which accompanied the bill, the floor debates in both Houses, and testimony in hearings before a Senate subcommittee all make it crystal clear that the phrase "air commerce" includes privately owned, as well as commercial, aircraft.

ARGUMENT

I

The Federal Kidnaping Act (18 U.S.C. 1201), Which Prohibits the Interstate Transportation of Any Person Kidnaped and Held "For Ransom or Reward or Otherwise," Is Not Confined In Its Application To Cases In Which the Kidnaper Seeks Some Pecuniary Benefit

The Federal Kidnaping Act (18 U.S.C. 1201) makes it a crime knowingly to transport in interstate or foreign commerce any person who has been kidnaped and held "for ransom or reward or otherwise." Here, Count 1 of the indictment charged that the "kidnapping and transportation was done for the purpose of transporting the said defendants from Dade County, Florida * * * to the Republic of Cuba * * *." The decision below—to the effect that the victim was not held for "ransom or reward or otherwise" because the defendants were not seeking pecuniary profit—is directly contrary to the decision of this Court in *Gooch* v. *United States*, 297 U.S. 124, holding that the transportation of police officers seized and held to prevent the arrest of their captors was an offense under the Act. The *Gooch* decision rejected the very same argument accepted by the district court here, *i.e.*, that under the rule of *ejusdem generis* the statutory words "ransom or reward or otherwise" are limited to pecuniary benefits or to the payment of some valuable consideration. The Court cited the reports of the Senate and House Judiciary Committees as showing that the amendment of May 18, 1934 (18 U.S.C. 408a, 48 Stat. 781-782)—which added the words "or otherwise"—was

intended by Congress to extend the Act's coverage to "persons who have been kidnaped and held, not only for reward, but for any other reason * * *" (297 U.S. at 127-128). Thus, the Senate Judiciary Committee, in recommending passage of the amendment had stated: [1]

> The purpose and need of this legislation are set out in the following memorandum from the Department of Justice:
>
> S. 2252; H.R. 6918: This is a bill to amend the Act forbidding the transportation of kidnaped persons in interstate commerce—act of June 22, 1932 (U.S.C., ch. 271, Title 18, sec. 408a), commonly known as the "Lindbergh Act." This amendment adds thereto the word "otherwise" so that the act as amended reads: "Whoever shall knowingly transport * * * any person who shall have been unlawfully seized * * * and held for ransom or reward or otherwise shall, upon conviction, be punished * * *." *The object of the addition of the word "otherwise" is to extend the jurisdiction of this act to persons who have been kidnaped and held, not only for reward, but for any other reason.*
>
> In addition, this bill adds a proviso to the Lindbergh Act to the effect that in the absence of the return of the person kidnaped and in the absence of the apprehension of the kidnaper during a period of 3 days, the presumption arises that such person has been transported in interstate or foreign commerce, but such presumption is not conclusive.

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[1] S. Rep. No. 534, 73d Cong., 2d Sess., March 22, 1934.

> I believe that this is a sound amendment which will clear up border-line cases, justifying Federal investigation in most of such cases and assuring the validity of Federal prosecution in numerous instances in which such prosecution would be questionable under the present form of this act. [Emphasis added.]

Similarly, the House Judiciary Committee declared: [2]

> This bill, as amended, proposes three changes in the act known as the "Federal Kidnaping Act." First, it is proposed to add the words "or otherwise, except, in the case of a minor, by a parent thereof." This will extend Federal jurisdiction under the act to persons who have been kidnaped and held, not only for reward, but *for any other reason*, except that a kidnaping by a parent of his child is specifically exempted. [Emphasis added.]

Reasoning that the Act should extend to cases where there was some "expectation of benefit to the transgressor," the Court held in *Gooch* that "[i]f the word reward, as commonly understood, is not itself broad enough to include benefits expected to follow the prevention of an arrest, they fall within the broad term, 'otherwise'" (297 U.S. at 128). Here, the alleged purpose of the kidnaping was to obtain the transportation of the defendants from Florida to Cuba. The kidnaping of the pilot was

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[2] H.Rep. No. 1457, 73d Cong., 2d Sess., May 3, 1934, p. 2.

essential to that end and therefore, just as in *Gooch*, was of benefit to the defendants and within the scope of the Federal Kidnaping Act.

Subsequent to *Gooch*, the lower federal courts have consistently adhered to the view that the Federal Kidnaping Act is violated if the restraint of the party kidnaped is of some benefit to the captor, whether or not that benefit is pecuniary. Thus in *United States* v. *Parker*, 103 F. 2d 857, 860-861 (C.A. 3), certiorari denied, 307 U.S. 642, the court of appeals held that the statute was violated where the purpose of the kidnaping was to extort a confession from the victim and thereby enhance the reputation of the kidnaper as a detective. The court stated:

> The statute prohibits the interstate transportation of persons kidnapped for other reasons than ransom or reward. It is not restricted to cases involving pecuniary benefit to the kidnappers. *Gooch* v. *United States*, 297 U.S. 124, 56 S. Ct. 395, 80 L. Ed. 522. We think that Congress by the phrase "or otherwise" intended to include any object of a kidnapping which the perpetrator might consider of sufficient benefit to himself to induce him to undertake it.

See, also, *Brooks* v. *United States*, 199 F. 2d 336 (C.A. 4) (to flog victims kidnaped by Ku Klux Klan); *Wheatley* v. *United States*, 159 F. 2d 599, 600 (C.A. 4) (to secure transportation in victim's automobile); *Bearden* v. *United States*, 304 F. 2d 532 (C.A. 5), certiorari granted and judgment vacated on another ground, 372 U.S. 252 (to steal aircraft for captor's transportation); *United States* v. *McGrady*, 191 F. 2d

829 (C.A. 7) (to force victims to aid kidnapers in escaping from prison); *United States* v. *Bazzell*, 187 F. 2d 878, 882 (C.A. 7), certiorari denied, 342 U.S. 849 (to place victim in house of prostitution); *Hayes* v. *United States*, 296 F. 2d 657, 666 (C.A. 8), certiorari denied, 369 U.S. 867 (to obtain transportation by victim in automobile); *Hess* v. *United States*, 254 F. 2d 578, 584 (C.A. 8) (to obtain transportation by victim in automobile); *Sanford* v. *United States*, 169 F. 2d 71 (C.A. 8) (to rob victim); *Langston* v. *United States*, 153 F. 2d 840 (C.A. 8) (to rob victim and prevent him from reporting automobile theft); *Poindexter* v. *United States*, 139 F. 2d 158 (C.A. 8) (to rape victim).

II

Section 902(i) of the Federal Aviation Act, Which Outlaws Air Piracy With Respect To "Any Aircraft In Flight In Air Commerce," Is Applicable Not Only To Commercial Airliners But To Private Aircraft As Well

Section 902 of the Federal Aviation Act of 1958, 49 U.S.C. 1472 (i), as amended in 1961,[3] makes

[3] S. 2268, the bill amending Section 902, was passed by the Senate, after debate, on August 10, 1961 (107 Cong. Rec. 15440). On August 14, 1961, it was referred to the House Committee on Interstate and Foreign Commerce (*id.*, p. 15796). On August 16, H.R. 8384, the House version of the amendments was reported to the House (H. Rep. No. 958) (*id.*, p. 16084). On August 21, H.R. 8384 was passed by the House (*id.*, pp. 16543, 16555). On August 23, the House amended S. 2268 by adding provisions of H.R. 8384, and passed S. 2268 as amended. The proceedings by which H.R. 8384 had been passed were vacated and that bill was laid on the table (*id.*, pp. 16848-16849). After the Senate had con-

punishable by fine or imprisonment the crime of "aircraft piracy," which it defines as

> any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce.

Section 101(4) of the Act, 49 U.S.C. 1301, defines the term "air commerce" as

> interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation or [*sic*] aircraft within the limits of any Federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

Subsection (5) of the same section defines the term "aircraft" as

> any contrivance now known or hereafter invented, used, or designed for navigation of or flight in the air.

Here, the Cessna airplane described in Count 2 of the indictment was plainly an "aircraft." The indictment charged that this aircraft was "in flight in air commerce;" that it was operated "within the limits of a Federal airway;" and that it was operated "so as to directly affect safety in interstate, overseas and for-

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curred in the House amendment and S. 2268 had been signed in both Houses (*id.*, pp. 17169-17174, 17302, 17445), it was approved by the President as Public Law 87-197 on September 5, 1961 (*id.*, p. 18311). The part of this Act covering "aircraft piracy" is 49 U.S.C. 1472(i), *supra*, p. 3.

eign air commerce." It further alleged that the defendants, with wrongful intent, exercised control of the aircraft by threat of force and violence, and unlawfully forced the pilot, at gunpoint, to fly the plane from Dade County, Florida, to the Republic of Cuba (R. 4). Thus, Count 2 properly charged all the elements of an aircraft piracy within the meaning of the Act.

In dismissing Count 2 on the ground that the phrase "aircraft in flight in air commerce" applied only to commercial airliners engaged in the carriage of goods and persons for hire (R. 7-8), the district court read into the Act a limitation which has no basis either in the text or legislative history of the statute. On its face, Section 902(i) applies without reservation to *any* aircraft which is in flight in "air commerce"; and the definition of "air commerce" embraces not only interstate, overseas, or foreign air commerce as such, but also any operation of any aircraft within the limits of a federal airway, or any operation of any aircraft which affects or may endanger safety in interstate, overseas, or foreign air commerce. Under this statutory scheme there is not the slightest justification for an interpretation which would confine the air piracy prohibition to carriers of goods and services for hire. Moreover, it is evident that when Congress wished to frame a provision applicable only to air carriers, it knew how to do so. For subsection (l) of Section 902, adopted at the same time as the air piracy subsection, outlaws the carrying of deadly or dangerous weapons on "an air carrier in air transportation."

If the text left any doubt as to the scope of Section 902(i), it would be laid to rest by the legislative history of the 1961 amendment. The House report which accompanied the bill (H. Rep. No. 958, 87th Cong., 1st Sess.) referred to the urgent need for stronger laws respecting criminal acts committed aboard "commercial and private aircraft" (at p. 3), and stated (at p. 8):

> The term "air commerce" was used designedly in this proposed new subsection [i], and in the proposed new subsections (j) and (k), because of its broad scope. The term is defined in existing law to include not only interstate, overseas, and foreign air commerce and the transportation of mail by aircraft, but also any operation or navigation of aircraft in a Federal airway or any such operation or navigation which directly affects, or may endanger safety in, interstate, overseas, or foreign air commerce.

The same report explicitly declared, moreover, that the subsections referring to "aircraft in flight in air commerce"—as distinguished from "aircraft being operated by an air carrier in air transportation", the phrase used in subsection (l)[4]—would apply in the case of "private aircraft" (*id.* at 15). In the floor debate, Congressman Harris, after restating the explanation of the term "air commerce" set forth in the report, noted (107 Cong. Rec. 16545) that

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[4] This distinction between subsections (i), (j), and (k) and subsection (l) of Public Law 87-197, amending section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472) was also made by Congressman Williams in the debates (107 Cong. Rec. 16547-16548).

"thousands of business and private aircraft, as well as air carrier aircraft, are covered."

Similarly, in Hearings before the Aviation Subcommittee of the Senate Committee on Commerce, 87th Cong., 1st Sess., on S. 2268, William K. Lawton, Executive Director of the National Business Aircraft Association, reminded Senator Engle, who had introduced the bill, that (at p. 56):

> * * * The proposals made in this bill affect every civil aircraft in the United States, and the reason I make this statement pointedly is that we have no desire to see the psychopaths, the weirdos, coming to the private aircraft and pointing guns because they realize from publicity that they cannot get away with it on airlines.

In the Senate debates, Senator Engle, responding to Senator Bush's query as to whether the bill applied to private aircraft, replied (107 Cong. Rec. 15243): "Yes, it applies to all airplanes in air commerce, which includes, of course, not only commercial aircraft, but private airplanes as well." And shortly afterward, this time in response to an inquiry by Senator Case as to the meaning of "air commerce", Senator Engle emphasized (107 Cong. Rec. 15243) that the statutory definition "is broad enough, as pointed out by the Airline Pilots Association, to take in privately owned as well as commercial aircraft." [5]

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[5] Senator Allott, in pointing out that the problem of the hijacking of aircraft is "not limited alone to airliners," referred to the hijacking by a Cuban jet fighter and the forced landing at Havana, Cuba, of a private Twin Bonanza plane owned by two United States citizens flying from Key West, Florida, to Nicaragua (107 Cong. Rec. 15425). See also

In sum, the legislative history forcefully confirms what the text of the Act would alone make clear: that the phrase "aircraft in flight in air commerce," as used in 49 U.S.C. 1472(i), designedly covers private aircraft as well as commercial airliners. Indeed, such coverage is essential if the statute is to achieve one of its cardinal purposes—to insure the safety of interstate air commerce. For when threatening weapons are employed against the pilot of an aircraft in flight, the menace of a fatal crash or collision—imperiling not only the pirated plane itself, but also other planes in the same airlane or persons on the ground—is present, whether the particular plane be commercially operated or "private."

CONCLUSION

For the reasons stated, we respectfully submit that this Court should reverse the judgment below and reinstate both counts of the indictment.

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JULY 1963

Hearings before the Aviation Subcommittee of the Senate Committee on Commerce on S. 2268, 87th Cong., 1st Sess., August 4, 1961, p. 57, where this incident is discussed.

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